NO. 77-603

Supreme Court, U. S.
FILED
FEB 17 1978
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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JAMES MARTORANO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A) is reported at 557 F.2d 1.[1] The opinion of the court of appeals denying a petition for rehearing (Pet. App. 24a-29a) is reported at 561 F.2d 406.

### JURISDICTION

The judgment of the court of appeals was entered on March 30, 1977. A petition for rehearing was de-

[1] The original opinion of the court of appeals (Pet. App. 1a-16a) was amended (Pet. App. 17a-23a) prior to its publication.

nied in part on May 23, 1977 (Pet. App. 17a-23a) and in part on August 24, 1977 (Pet. App. 24a-29a). Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 23, 1977 (Pet. App. 30a). The petition for a writ of certiorari was filed on October 25, 1977, a Tuesday following a Monday holiday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner was in any way affected by the permissible inference in 18 U.S.C. 892(b) that a particular extension of credit is extortionate if each of four specified factors is present in connection with that extension of credit.

2. Whether the district court impermissibly restricted petitioner's cross-examination of a government witness concerning the basis of the witness's knowledge of petitioner's reputation for violence.

3. Whether the statements of one of petitioner's co-conspirators were properly admitted into evidence against petitioner.

## STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of making an extortionate extension of credit, using extortionate means to collect an extension of credit, and conspiring to commit those offenses,



in violation of 18 U.S.C. 892 and 894. He was sentenced to ten years' imprisonment and fined $10,000 (App. 108).[2] The court of appeals affirmed (Pet. App. 1a-16a).

The charges arose from a loan made by petitioner to Peter J. Pallotta. The evidence showed that in the late Summer of 1974 Pallotta, the owner of an unsuccessful nightclub, tried to borrow money from various "loan sharks" to meet the club's operating expenses (App. 234-236). In late August or early September, Pallotta went to see petitioner at his restaurant to seek a loan. Petitioner agreed to lend Pallotta $2,000 at an interest rate of five percent per week; no papers were signed and no collateral was requested or tendered (App. 241-242).

At petitioner's direction, Pallotta returned to petitioner's restaurant on the following day to pick up the money. With petitioner at that meeting was co-defendant James Matera. After handing Pallotta the money, petitioner instructed Matera to collect the weekly interest payments on Friday nights at Pallotta's club (App. 242-244). During the next four weeks, Pallotta made the weekly interest payments. On three occasions, once while accompanied by co-defendant Frank Pagano, Matera picked up the money from Pallotta at his nightclub; once, when Matera was busy, Pallotta delivered the money directly to petitioner (App. 260-262).

In October 1974, Pallotta's nightclub was closed for renovations and Pallotta fell behind in his weekly

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[2] "App." refers to the appendix in the court of appeals.

payments (App. 262-263). On the evening that the club reopened, petitioner and co-defendant Edward Halloran appeared at the club. Pallotta departed, fearing that he would be beaten for having missed his payments (App. 267-268). The next day, Pallotta received a telephone call as a result of which he agreed to make himself available to petitioner that evening (App. 268-269). That night, Halloran accosted Pallotta in the nightclub's parking lot, accused him of sneaking out on petitioner the previous night, and stated that petitioner had sent him to collect the back interest payments. Halloran then drew a gun and forced Pallotta to hand over $445 from the club's cash boxes (App. 269-271; 482-483; 507-508). Three days later, Pallotta went to see petitioner, who warned him "[d]on't be late and see me every week and if you're not going to be here, I want a phone call from you" (App. 272-273).

Shortly thereafter, the club was permanently closed and Pallotta, fearing physical injury, went into hiding. He subsequently sought protection from the FBI. Working in concert with law enforcement officers, Pallotta made a series of phone calls to Halloran, Matera, Pagano, and petitioner, all of which were recorded. The tape recordings of these conversations were played at trial (App. 114-149, 273-277, 551-556). In the course of one of the conversations, petitioner suggested that Pallotta stop by and see him (App. 116). When Pallotta expressed his fear of being harmed, petitioner responded (App. 117):



> Don't talk like that on the phone. * * * You can come any time, what do you think I'm gonna do something 'round my own place? Be kind of stupid wouldn't it? Ah, first chance you get drop by and see me, alright?

The conversations between Pallotta and Pagano verified the existence of the loan (App. 119-123), revealed that Pagano and Matera had supplied petitioner with half the money involved in the loan (App. 128), and confirmed Pallotta's fear that he would be injured if he went to see petitioner at his restaurant (App. 120, 123-124, 144-145).

At trial, Pallotta testified that at the time of the loan he knew petitioner was a loan shark with a "100 percent" collection record, and that "[n]obody missed" his payments because "[i]f they did, they got hurt" (App. 246-247). He testified that he also knew that co-defendants Halloran, Matera, and Pagano were loan sharks, that they would hurt any borrower who was late or failed to make a payment, and that Halloran collected for petitioner (App. 249, 256-259).[3] Finally, Pallotta testified that at the time the loan was made he expected that he would be physically harmed if he failed to repay the loan on time (App. 257).

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[3] The reputation evidence was admitted to show Pallotta's state of mind at the time the loan was made. See *United States* v. *Natale*, 526 F.2d 1160, 1168-1169 n. 10 (C.A. 2), certiorari denied. 425 U.S. 950; *United States* v. *Bowdach*, 501 F.2d 220, 226-227 (C.A. 5), certiorari denied, 420 U.S. 948.

## ARGUMENT

1. Petitioner argues at some length (Pet. 13-25) that the use of the statutory inference permitted by 18 U.S.C. 892(b) creates an unconstitutional presumption, and that his convictions on Counts I and II must therefore fall. Whatever the abstract merits of petitioner's contention, the fatal flaw precluding consideration of the contention in the present case is that the jury convicted petitioner without in any way relying on the Section 892(b) inference, which was not mentioned to it in the court's instructions, and the court of appeals found the evidence sufficient to support that conviction, either with or without the inference (Pet. App. 5a-6a). Petitioner was thus in no way prejudiced by the operation of Section 892(b) and is in no position to challenge its constitutionality.

Under 18 U.S.C. 892(a), the offense charged in Counts I and II, the government must ordinarily prove that both the lender and the borrower understood at the time of the loan that delay or failure in making repayment "could result in the use of violence or other criminal means." 18 U.S.C. 891(6). Because Congress appreciated that victims might often be reluctant to testify and that it would therefore be difficult in many cases to produce direct evidence of the understanding of the parties, Section 892(b) was added to provide an alternate means of proving a violation of Section 892(a). H.R. Conf. Rep. No. 90-1397, 90th Cong., 2d Sess. 29 (1968).



Section 892(b) provides that in place of showing that both the lender and the borrower contemplated the use of violence in case of default, the government can establish a *prima facie* violation of Section 892(a) by proving that four factors accompanied the loan in question: (1) repayment was legally unenforceable; (2) the annual interest rate exceeded 45 percent; (3) the debtor reasonably believed that the lender had used extortionate means to collect debts in the past or that he had a reputation for doing so; and (4) the total amount of the loan exceeded $100.

In this case, the conviction was obtained directly under Section 892(a), without the need for reliance on the Section 892(b) inference. The trial court instructed the jury, in accordance with Sections 892(a) and 891(6), that in order to convict petitioner, they had to find beyond a reasonable doubt that the loan to Pallotta was made (App. 812)

> with the mutual understanding on the part of Pallotta and [petitioner] that if there were delays in making repayment or a failure to make repayment that violence or other criminal means to cause harm to Pallotta would be used * * *.

The court repeated its charge on the elements of the offense under Section 892(a) (App. 812-813), again emphasizing the need to prove that both petitioner and Pallotta understood that violence might be used. In addition, the court twice instructed the jury on the definition of "extortionate extension of credit" in Section 891(6), both times correctly noting that the

definition required that both lender and borrower contemplate the possible use of violence (App. 805, 807).[4]

The court of appeals rejected the claim that there was insufficient evidence to support the jury's conclusion that petitioner understood that violence would accompany nonpayment of the loan. While the court held that the evidence was sufficient to satisfy the statutory inference under Section 892(b) (Pet. App. 5a), it also held that there was ample direct evidence of petitioner's understanding that violence might be used, including the recording of petitioner's highly incriminatory telephone conversation with Pallotta (Pet. App. 6a).

Besides that conversation, in which petitioner warned Pallotta not to discuss his fears of being injured over the telephone and added that Pallotta had nothing to fear because it would be foolish for petitioner to "do something 'round my own place[?]" (App. 117), the evidence showed that petitioner had made an unannounced appearance at Pallotta's nightclub together with co-defendant Halloran, and that the next night Halloran had forced Pallotta to make a $445 loan payment at gunpoint. Following this incident, petitioner had warned Pallotta, "[d]on't be

[4] As the court of appeals pointed out (Pet. App. 5a-6a), the trial court referred to the interest rate on the loan and to the fact that the loan was unenforceable in Massachusetts (App. 810-811)—two of the factors referred to in Section 892(b)—but rather than telling the jury that it could convict solely on the basis of those or any other factors, the court merely stated that the jury could "give [the factors] such weight as [the jury] deem[ed] appropriate" (App. 810).



late and see me every week." From all of this evidence, the jury could well infer that the use of violence against defaulting borrowers was a familiar practice to petitioner and that he had contemplated the possible use of violence at the time the loan was made. In addition, the jury was entitled to consider that the loan was an oral, unsecured obligation, made at an annual rate of interest of 260 percent, with provision for repayment at the borrower's place of business. See *United States* v. *Annoreno*, 460 F.2d 1303, 1308-1309 (C.A. 7), certiorari denied, 409 U.S. 852. The court of appeals was thus clearly correct in concluding that the evidence was sufficient to sustain petitioner's conviction without the need to rely on Section 892(b).

In any event, the inference permitted by Section 892(b) does not run afoul of the Due Process Clause. The statutory presumptions in *Leary* v. *United States*, 395 U.S. 6, and *Tot* v. *United States*, 319 U.S. 463, were both, as this Court concluded, contrary to fact. The inference established by Section 892(b), however, is consistent with experience and therefore does not offend due process principles. *Barnes* v. *United States*, 412 U.S. 837. *United States* v. *Gainey*, 380 U.S. 63, 68-70. In enacting Section 892(b), Congress recognized that if all four factors are established, the existence of an "understanding" that violence would be used follows almost inexorably. As was stated in the conference report (H.R. Conf. Rep. No. 90-1397, *supra*, at 29):

> In arms length transactions, people simply do not lend sums of money at exorbitant rates of inter-

> est under circumstances where they cannot enforce the obligation to repay. Where the prosecution has shown the absence of legal means to enforce the obligation, it is a reasonable inference, in the absence of evidence to the contrary, that illegal means were contemplated.

See also *Perez* v. *United States*, 402 U.S. 146, 155-156; *United States* v. *DeVincent*, 546 F.2d 452 (C.A. 1), certiorari denied, 431 U.S. 903.

2. Petitioner next contends (Pet. 26-30) that the district court improperly curtailed his cross-examination of Pallotta by sustaining objections to questions asking the names of the individuals who had informed Pallotta about petitioner's reputation. While noting that cross-examination of a reputation witness as to the identities of his sources is often permitted, the court of appeals concluded that under the circumstances of this case the trial court did not abuse its discretion in restricting cross-examination on this matter (Pet. App. 19a-22a).[5]

As the court of appeals noted (Pet. App. 20a), the court's ruling on the scope of cross-examination interfered only minimally with petitioner's efforts to cast doubt on Pallotta's testimony about his fears and

[5] The court of appeals pointed out that in limiting petitioner's inquiry as to his sources' names the court was apparently concerned with protecting third persons in the community from reprisals (Pet. App. 20a-21a), a legitimate interest that it was properly entitled to consider in exercising its well-recognized discretion to control the scope of cross-examination. See *Geders* v. *United States*, 425 U.S. 80, 86-87; *Hamling* v. *United States*, 418 U.S. 87, 124-125, 127.



petitioner's reputation. First, there were a variety of other lines of inquiry that counsel could have pursued in an effort to impeach Pallotta's testimony on these points. Pallotta could have been asked to specify particular comments he had heard that formed the basis for his belief that petitioner was reputed to use violent collection methods. He could have been asked the times and places at which he had heard these comments, and the number of persons from whom he had heard them. And he could have been asked whether he was personally aware of any such incidents. Pallotta's inability to give specific answers to these questions would have served petitioner's purpose of discrediting his reputation testimony. Petitioner was also free to introduce reputation evidence that rebutted Pallotta's testimony. His failure to employ any of these impeachment devices to any significant extent lends weight to the conclusion of the court of appeals that petitioner's decision to pursue the names of sources "is consistent with a tactical purpose to gain some advantage from Pallotta's obvious reluctance to name specific individuals" (Pet. App. 21a n. 8).

Even if the district court had required Pallotta to name his sources, it would have been appropriate for the court to have curtailed collateral inquiry into whether those persons in turn had a sound basis for their impressions of petitioner's reputation. Since from Pallotta's testimony it appeared that he could have given names if the government's objection had not been sustained (Pet. App. 21a), petitioner lost

very little by virtue of the district court's ruling. This case is therefore very different from *Davis* v. *Alaska*, 415 U.S. 308, on which petitioner chiefly relies. In *Davis*, this Court held that the defendant's cross-examination rights had been improperly restricted when the trial court refused to permit him to question the chief government witness about his prior conviction for burglary and his status as a probationer. The Court noted that these facts were critical to the defendant's effort to show that the witness was biased and that he feared being accused of the very burglary for which the defendant was on trial. In this case, by contrast, the restriction on cross-examination did not bar petitioner from demonstrating bias or otherwise impeaching Pallotta. Since the impeachment value of Pallotta's ability or inability to provide the names of his sources would have been minimal at best, petitioner cannot reasonably claim to have been denied his Sixth Amendment right "to be confronted with the witnesses against him."

3. Finally, petitioner argues that the out-of-court statements of alleged co-conspirator Pagano were improperly admitted against him.

The trial court permitted the government to introduce Pagano's statements in his tape-recorded conversations with Pallotta as the declarations of a co-conspirator, Fed. R. Evid. 801(d)(2)(E), and the court of appeals held that this evidence was properly admitted. Petitioner objects that there was insufficient independent evidence that he was engaged in a conspiracy with Pagano to permit the admission of



Pagano's statements. More broadly, petitioner contends that the court of appeals has improperly construed Rule 104(a) of the Federal Rules of Evidence as overriding this Court's decision in *Glasser* v. *United States*, 315 U.S. 60. This action, he contends, conflicts with the decisions of various other courts of appeals and runs afoul of the Confrontation Clause as well.

In fact, the court of appeals specifically *declined* to hold that Rule 104(a) overrides the requirement in *Glasser* that a defendant's participation in a conspiracy be proved by evidence independent of the statement at issue. Quite the contrary, the court held that "the tapes of the Pagano-Pallotta conversations were properly admitted under *Glasser*" (Pet. App. 24a-25a), and it emphasized that "our opinions in this case should not be understood as deciding anything about the continued viability of *Glasser*" (Pet. App. 29a). Indeed, the court of appeals concluded that the non-hearsay evidence in the case provided "a solid basis" for the conclusion that a conspiracy existed among the co-defendants and petitioner (Pet. App. 25a).

As the court stated, the independent evidence of petitioner's involvement in the conspiracy with Pagano was ample to meet the *Glasser* test.* The evidence

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* Significantly, petitioner makes no real effort to show that the court of appeals erred in its conclusion that there was sufficient non-hearsay evidence to meet the *Glasser* standard, preferring instead to focus upon his theoretical disagreement with portions of the court's opinions. His only quarrel

showed that Pagano and Matera were long-time loan shark partners; that Matera was working closely with petitioner in the Pallotta loan venture; that Pagano accompanied Matera to collect one of the interest payments from Pallotta; and that Pagano was aware of Pallotta's plight and was trying to find ways to facilitate future payments to petitioner. (Pet. App. 26a-27a). On the basis of this evidence, the court of appeals observed (Pet. App. 27a):

> We thus have no difficulty concluding that [the evidence] preponderates in favor of the existence of a conspiracy between Pagano and [petitioner]. It is true that each of these items is susceptible to an interpretation other than Pagano's participation in the conspiracy. However, when viewed together, each of them gains color from the others and they satisfy us that Pagano and [petitioner] had associated themselves "in a concerted mutual venture."

Since the court of appeals correctly held that the *Glasser* test was met in this case, petitioner is incor-

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with the court's actual assessment of the non-hearsay evidence appears to be with respect to the declarations of Pagano that the court determined to be "verbal acts." Petitioner contends that although these "verbal acts" were not hearsay as to Pagano, they were nonetheless hearsay as to petitioner (Pet. 13). In this contention, petitioner is plainly mistaken. Verbal acts, admitted for the fact that the utterance occurred rather than to prove the truth of its contents, are not hearsay at all; they are freely admissible independent of any preliminary finding that petitioner was engaged in the conspiracy. See *Anderson* v. *United States*, 417 U.S. 211, 219-221; *United States* v. *Geaney*, 417 F.2d 1116, 1120 n. 3 (C.A. 2).



rect in claiming that the court's decision flies in the face of *Glasser* or conflicts with other circuits in their treatment of co-conspirators' declarations.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 258698 109